

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

JOSEPH DOMINGO,)	CIV. NO. 06-00301 HG-KSC
)	
Petitioner,)	
)	FINDINGS AND
vs.)	RECOMMENDATION TO GRANT
)	PETITION FOR WRIT OF
JAMES PROPOTNICK, Acting)	HABEAS CORPUS
Director, Department of)	
Public Safety, State of)	
Hawaii,)	
)	
and)	
)	
CLAYTON FRANK, Warden,)	
Halawa Correctional)	
Facility,)	
)	
Respondents.)	
_____)	

FINDINGS AND RECOMMENDATION TO GRANT
PETITION FOR WRIT OF HABEAS CORPUS

Before the Court is Petitioner Joseph Domingo's ("Domingo") petition for writ of habeas corpus ("Petition") filed pursuant to 28 U.S.C. § 2254 ("Section 2254"). Domingo challenges the extended-term sentence imposed upon him, claiming that it violates Apprendi v. New Jersey, 530 U.S. 466 (2000).

On June 22, 2006, this Court issued an Order to

Show Cause directing Respondents James Propotnick and Clayton Frank ("Respondents") to file an answer to the Petition. On August 30, 2006, Respondents filed their Answer to Petition for Writ of Habeas Corpus ("Answer"). On September 27, 2006, Domingo filed Petitioner's Reply to Respondents' Answer ("Reply").

The Petition was referred to this Court pursuant to Local Rule 72.5 of the Local Rules of the United States District Court for the District of Hawaii ("Local Rules"). Upon careful consideration of the Petition, the Answer, and the Reply, this Court FINDS and RECOMMENDS that the Petition be GRANTED.

BACKGROUND AND PROCEDURAL HISTORY

Domingo, a state prisoner, has filed the instant petition for habeas corpus pursuant to Section 2254. Domingo challenges the extended sentence imposed upon him at his sentencing by a state judge pursuant to Hawaii state law in effect at the time he was sentenced. Domingo claims the extended-term sentence imposed upon him violates Apprendi, 530 U.S. 466.

On September 24, 2003, Domingo was convicted following a jury trial of one count of sexual assault in

the first degree, in violation of Hawaii Revised Statutes ("HRS") § 707-730(1)(b) (1993 Repl.), and four counts of sexual assault in the third degree, in violation of HRS § 707-732(1)(b) (1993 Repl.). Thereafter, Domingo filed a motion for judgment of acquittal with respect to Count I, sexual assault in the first degree. On November 4, 2003, the Circuit Court of the First Circuit for the State of Hawaii ("circuit court") granted the motion in part by vacating the conviction in Count I for the offense of sexual assault in the first degree and entered judgment in Count I as guilty on the included offense of sexual assault in the third degree. Thus, Domingo was convicted of five counts of sexual assault in the third degree.

On January 23, 2004, the State filed a Motion for Extended Term of Imprisonment as a "multiple offender" pursuant to the then-existing versions of HRS §§ 706-661 and 706-662(4)¹. On February 17, 2004, the State's Motion

¹ On June 22, 2006, the Hawaii Legislature approved Act 230 (H.B. 3256) which amended HRS § 706-662 by eliminating the "necessary for protection of the public" language, among other things. However, this

for Extended Term of Imprisonment came on for hearing before the Honorable Sandra A. Simms. On May 24, 2004, the circuit court issued a Findings of Fact, Conclusions of Law and Order Granting State's Motion for Extended Term of Imprisonment. The circuit court found, among other things, that Domingo was a multiple offender and that an extended term of imprisonment of ten (10) years on Counts 1-5, to be served concurrently, was necessary for the protection of the public. Specifically, the circuit court found: (1) the sexual assaults were committed against a minor child; (2) the sexual assaults occurred on numerous occasions over a long period of time; (3) the victim had experienced significant trauma a result of the sexual assaults; and (4) an extended term of imprisonment if ten (10) years in Counts 1-5 is necessary for the protection of the public. See Findings of Fact, Conclusions of Law, and Order Granting State's Motion for Extended Term of Imprisonment at ¶¶ 6-9.

amendment does not affect the Court's analysis in this case because Domingo is challenging his sentence under the version of HRS § 706-662 in effect at the time of his sentencing.

Domingo appealed directly to the Hawaii Supreme Court, claiming, in pertinent part, that his extended sentence violated his rights under the United States and Hawaii Constitutions. On June 14, 2005, the Hawaii Supreme Court filed its decision denying Domingo's direct appeal. On July 6, 2005, the Hawaii Supreme Court filed a Notice of Judgment on Appeal. On May 31, 2006, Domingo filed his Petition challenging his sentence.

DISCUSSION

Domingo requests relief from his concurrent ten-year extended terms sentence pursuant to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. Under the AEDPA, a person in state custody must first exhaust his state remedies before filing a habeas corpus petition in federal court. See 28 U.S.C. § 2254(b)(1)(A). Here, Domingo raised his Apprendi claim on direct appeal to the Hawaii Supreme Court. Therefore, the Court finds that Domingo has exhausted his state remedies. In addition, the AEDPA requires that a person in custody file an application for a writ of habeas corpus within one year

after the judgment under attack becomes "final by the conclusion of direct review or the expiration of the time for seeking review." 28 U.S.C. § 2244(d)(A). In Domingo's case, judgment became final on July 6, 2005 and Domingo filed his Petition on May 31, 2006.

Therefore, Domingo's Petition is timely. Having found that Domingo has exhausted his state remedies and filed his Petition within the one-year statute of limitations period, the Court will address the merits of Domingo's Petition.

Section 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim-

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). For purposes of Section 2254(d)(1), "clearly established federal law" is the governing law set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63, 71 (2003). A state court decision is "contrary to" clearly established federal law "if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result." Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir.) cert. denied, 540 U.S. 968 (2003).

Under the "unreasonable application" clause, a court may grant habeas relief when "the state court identifies the correct governing legal rule from a [Supreme Court] case, but unreasonably applies it to the facts of the particular case," or when "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where

it should apply." Williams v. Taylor, 529 U.S. 362, 407 (2000). In addition, the "unreasonable application" clause requires the state court decision to be "objectively unreasonable" rather than merely "incorrect or erroneous." Lockyer, 538 U.S. at 75.

In his Petition, Domingo argues that by imposing an extended sentence upon him, the circuit court violated his right to trial by jury under the Sixth Amendment as enunciated by Apprendi, 530 U.S. 466 and Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006)(holding that HRS § 706-662, Hawaii's extended sentencing statute, violates Apprendi). Domingo argues that the circumstances in his case are identical to the factual circumstances presented in the Kaua case. Both Kaua and Domingo were convicted following a jury trial. At sentencing, the State moved for extended terms of imprisonment pursuant to the then-existing versions of HRS §§ 706-661 and 706-662 in both cases. Finally, the sentencing judge in both cases made a protection of the public finding in determining that an extended-term sentence was warranted. Therefore, Domingo argues, as

in Kaua, this Court should similarly find that Domingo's extended-term sentence is contrary to clearly established federal law, namely, Appendi.

In Respondents' Answer, Respondents argue that the facts that subjected Domingo to extended terms of imprisonment as a multiple offender were his multiple felony convictions-and such facts are expressly exempt under Appendi. Respondents rely on the Hawaii Supreme Court's holding in State v. Rivera, 102 P.3d 1044, 1061 (Haw. 2004) and argue that Domingo was properly sentenced pursuant to Hawaii's multiple offender statute in effect at the time of his sentencing. In Rivera, the Hawaii Supreme Court held that Appendi does not bar "prior convictions" as a basis for which a sentencing court may exercise its discretion and impose an extended term of incarceration. Rivera, 102 P.3d at 1061. In addition, in accordance with the Hawaii Supreme Court's decisions in Rivera and State v. White, 129 P.3d 1107, 1117 (Haw. 2006)², Respondents argue that

² Following the Ninth Circuit's affirmation of the Hawaii District Court decision Kaua v. Frank, 350 F.

the sole determining factor that exposes a criminal defendant to extended terms of imprisonment as a persistent and multiple offender are his multiple convictions. Therefore, Respondents assert that the Hawaii Supreme Court's interpretation of HRS § 706-662 is not contrary to clearly established federal law and the Court should defer to the Hawaii Supreme Court's interpretation of its own state statute.

The issue before the Court is whether the Hawaii Supreme Court's decision to affirm Domingo's extended-term sentence is contrary to clearly established federal law. The Court may not justify the state appellate court's ruling on the basis of alternative grounds that the court did not articulate. Van Lynn v. Farmon, 347 F.3d 735, 737 (9th Cir. 2003). In this case, the Hawaii Supreme Court's Summary Disposition states in pertinent part: "Domingo's

Supp. 2d 848 (2004), the Hawaii Supreme Court has nonetheless maintained its position that Hawaii's multiple offender statute is constitutional. See State v. White, 129 P.3d 1107, 1109 (2006)(declining to follow the Ninth Circuit's holding based on it being only "persuasive authority" and not binding).

arguments against his extended terms of imprisonment have been foreclosed by this court's decision in State v. Rivera, 102 P.3d 1044 (2004), which held that Hawaii's extended term sentencing scheme is not incompatible with the United States Supreme Court's decision in Blakely v. Washington, 124 S.Ct. 2531 (2004)." Accordingly, the Court will look to the reasoning articulated by the Hawaii Supreme Court in Rivera in analyzing whether the Hawaii Supreme Court's decision to affirm Domingo's extended sentence was contrary to clearly established federal law.

In Rivera, 102 P.3d 1044, the Hawaii Supreme Court examined the issue of whether Hawaii's procedure for imposing an extended-term sentence, set forth in HRS § 706-662, passes constitutional muster under Appendi.³ The Hawaii Supreme Court applied an

³ The then-existing version of HRS § 706-662 provided in pertinent part:

Criteria for extended term of imprisonment. A convicted defendant may be subject to an extended term of imprisonment under section 706-661, if the convicted defendant satisfies one or more of the following criteria:

"intrinsic-extrinsic" dichotomy in determining whether a judge or jury decides whether an extended-term sentence is warranted. See id. The Hawaii Supreme Court reasoned that "extrinsic" facts, such as those involved in finding that a defendant's extended-term incarceration is necessary for the protection of the public, are outside the Appendi rule and may be found by a judge without violating the Sixth Amendment right to trial by jury. Kaua, 72 P.3d at 484-85.

In Appendi, the Supreme Court held that,

...

(4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant is being sentenced for tow or more felonies or is already under sentence of imprisonment for felony; or

(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively, would equal or exceed forty years if the extend term imposed is for a class A felony.

HRS § 706-662(4).

"[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. The Supreme Court stated that "the relevant inquiry is not one of form but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict." Id. at 481. The holding in Apprendi is limited to cases in which the statutory range of punishment has been exceeded. See id. In Blakely v. Washington, 542 U.S. 296, 303 (2004), the Supreme Court majority explained that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (citations omitted).

The Ninth Circuit has recently held that HRS § 706-662, Hawaii's extended sentencing statute, violates Apprendi because it allows a judge to make the factual finding that a convicted person's incarceration

is necessary for the protection of the public, thereby allowing for an increased sentence beyond the range justified by the jury's determination of guilt. See Kaua v. Frank, 436 F.3d 1057 (9th Cir. 2006).

According to the Ninth Circuit, such a determination by a judge is contrary to clearly established federal law as determined by the Supreme Court. Id. at 1062.

Thus, the Ninth Circuit has rejected the reasoning set forth by the Hawaii Supreme Court in Rivera, 102 P.3d 1044.

The Court agrees with Domingo that the facts of Kaua are indistinguishable from his case. In Kaua, Kaua had received an extended sentence pursuant to the then-existing version of HRS § 706-662(4). In determining Kaua's sentence, the sentencing judge conducted a two-step process. See Kaua, 436 F.3d at 1059. First, the court found that Kaua was considered a "multiple offender" pursuant to HRS § 706-662(a). Id. Second, the court determined that the imposition of an extended sentence was necessary for the protection of the public. Id.

In determining Kaua's sentence, the sentencing judge found a number of specific facts which led to her determination that an extended sentence was necessary for the protection of the public. Those facts included, "Kaua's history of substance abuse; his abuse of drugs shortly before the hostage standoff; his history of assaultive behavior; his inability to control his behavior while under the influence or while under stress; his access to firearms; his lack of experience using the weapon with which he perpetrated the standoff; and the strong possibility that he could have injured minors and innocent bystanders because of his inexperience." Kaua, 436 F.3d at 1059. After making these findings, the sentencing judge imposed an extended sentence.

In the instant case, Domingo was sentenced pursuant to the then-existing version of HRS § 706-662(4)(the same version of the statute that Kaua was sentenced under). The circuit court followed the same two-step process in sentencing Domingo as it did in Kaua's case. With respect to step two, in making the

determination that an extended sentence was necessary for the protection of the public, the sentencing judge made the following findings: (1) the sexual assaults were committed against a minor child; (2) the sexual assaults occurred on numerous occasions over a long period of time; (3) the victim had experienced significant trauma a result of the sexual assaults; and (4) an extended term of imprisonment if ten (10) years in Counts 1-5 is necessary for the protection of the public.

The Ninth Circuit's decision in Kaua, 436 F.3d 1057 is directly on point and provides the controlling rule of law in this case. The sentencing judge in Domingo's case improperly made a protection of the public finding without the facts underlying her finding being found by a jury. Consequently, the Court finds that Domingo's extended-term sentence violates clearly established federal law as articulated in Apprendi. See Kamana'o v. Peyton, No. 05-681, slip. op. at 12-18, (D. Hawaii June 21, 2006).

CONCLUSION

The Court FINDS and RECOMMENDS that Domingo's Petition be GRANTED, Domingo's sentence be vacated, and that the case be remanded to the circuit court for resentencing in accordance with this Findings and Recommendation.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawai'i, December 20, 2006.




Kevin S.C. Chang
United States Magistrate Judge

Joseph Domingo v. James Propotnick, et al., Civ. No. 06-00301 HG-KSC; Findings and Recommendation to Grant Petition for Writ of Habeas Corpus